



**State of New Jersey**  
DEPARTMENT OF COMMUNITY AFFAIRS  
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CHRIS CHRISTIE  
*Governor*

KIM GUADAGNO  
*Lt. Governor*

CHARLES A. RICHMAN  
*Commissioner*

**FINAL DECISION**

**April 26, 2016 Government Records Council Meeting**

Harry B. Scheeler, Jr.  
Complainant

Complaint No. 2015-141

v.

City of Jersey City (Hudson)  
Custodian of Record

At the April 26, 2016 public meeting, the Government Records Council (“Council”) considered the April 19, 2016 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. In the Custodian’s May 8, 2015 response, he informed the Complainant that the requested video was 167 MB and exceeded the limitations of the City’s network for sending via e-mail. Therefore, the Custodian did not violate OPRA for failing to provide the record in e-mail because he certified that he was unable to do so and offered an alternative method for disclosure of the record (sending a CD via mail).
2. In the instant matter, the Complainant’s decision not to provide his mailing address prevented the Custodian from calculating the actual cost of postage to provide the requested record. Therefore, the GRC finds that no unlawful denial of access occurred, because the Custodian certified that he was unable to provide the responsive video because the Complainant chose not to provide a mailing address. The Complainant would have needed to submit a mailing address in order for the Custodian to calculate and charge the actual postage cost to provide the requested record to the Complainant. See Livecchia v. Borough of Mount Arlington, GRC Complaint No. 2008-80 (April 2010).

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.



Final Decision Rendered by the  
Government Records Council  
On The 26<sup>th</sup> Day of April, 2016

Robin Berg Tabakin, Esq., Chair  
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: May 2, 2016**

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
April 26, 2016 Council Meeting**

**Harry B. Scheeler, Jr.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-141**

**v.**

**City of Jersey City (Hudson)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** The police officer's video recorded of Joe Feranti, which was the subject of this news article: <http://pix11.com/2015/04/28/man-claims-he-was-illegally-detained-for-filming-jersey-city-police/>

**Custodian of Record:** Robert Byrne

**Request Received by Custodian:** April 29, 2015

**Response Made by Custodian:** May 8, 2015

**GRC Complaint Received:** May 20, 2015

**Background<sup>3</sup>**

**Request and Response:**

On April 29, 2015, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned record.<sup>4</sup> On May 8, 2015, the Custodian's Counsel responded in writing, stating that the requested video is 167 megabytes and exceeds the limitations of the City's network for sending via e-mail. The Custodian's Counsel requested that the Complainant remit a check or money order, payable to the City, for \$1.00, along with a self-addressed postage prepaid envelope to accommodate a compact disc to the City Clerk. He stated that upon receipt of payment and the appropriate envelope, the disc would be mailed to him. The Custodian's Counsel also noted the option of picking up the CD in person.

That same day, the Complainant responded, "I'm not aware in this day of disks costing \$1.00 please provide a receipt for the disk purchased" (sic). On May 12, 2015, the Custodian's Counsel responded that, "with the current supplies in this office, the combined price for a compact disk and protective case is \$0.68." The Complainant replied on May 20, 2015, advising

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by John McKinney, Esq. (Jersey City).

<sup>3</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

<sup>4</sup> The Complainant's original OPRA request sought additional items, but he stated that those items were not in dispute in the instant complaint.

that he was “rejecting this response” because “[t]here is no president [*sic*] to require me to supply a self addressed [*sic*] stamped envelope. Current case law shows you can charge me actual postage[,] not estimated.” The Complainant thereafter filed an OPRA request “for the purchase order for the DVD supplies you currently have.”<sup>5</sup>

Later that same day, the Custodian’s Counsel responded with a breakdown of the CD-R costs and attached a .pdf copy of the prices paid for CD-Rs and CD cases by the office. He wrote that the office purchased a spindle of 50 CD-Rs for \$19.65, making the cost per CD-R \$0.393. The City purchased cases in packages of 50 for \$14.25, making the cost per case \$0.285. The Custodian’s Counsel thereafter requested that the Complainant submit a payment in the form of check or money order of \$1.68 together with a self-addressed postage prepaid envelope to accommodate a compact disc. In a follow-up e-mail sent later that day, the Custodian’s Counsel clarified that the payment amount requested to process the request was \$0.68.

#### Denial of Access Complaint:

On May 20, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the Custodian “is insisting on the requester provid[ing] a ‘self addressed stamped’ envelope” in order for the DVD to be mailed. The Complainant argued that such a request is “an impassable obstacle” as a Custodian must grant access to a government record by the method of delivery requested by the requestor (regular mail, fax, or e-mail). O’Shea v. Townshp of Fredon (Sussex), GRC Complaint No. 2007-251 (April 2008). The Complainant further argued that charges for such delivery must reflect actual cost.

The Complainant argued that the Custodian’s request for a self-addressed, stamped envelope would require the requestor to take into consideration the approximate weight of the disk, then calculate the additional weight of the envelope to come up with an “estimated” appropriate package, potentially creating a situation where the requestor overpays the “actual” cost. Of note, the Complainant acknowledged the Council’s previous holding that “[i]t is reasonable for a custodian to charge a requestor the actual postage cost associated with delivering records by mail.” Livecchia v. Borough of Mount Arlington, GRC Complaint No. 2008-80 (April 2010).

The Complainant requested that the Custodian be found in violation of OPRA for failing to provide the record in the specified delivery method and that the GRC issue an order for the release of the requested record, based on the actual cost of postage.

#### Statement of Information:

On June 11, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that he received the Complainant’s OPRA request on April 29, 2015. The Custodian certified that the responsive video was approximately 167 megabytes in size and too large to be transmitted over e-mail due to a 10 megabyte file size limitation for attachments on the City’s e-mail system. The Custodian certified that the City responded to the OPRA request in writing on

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<sup>5</sup> The subsequent OPRA request is not the subject of the instant complaint.

May 8, 2015, at which time the Complainant was informed of the file size limitation. The Custodian additionally averred that the City asked the Complainant to remit a check or money order, payable to the City for \$1.00, together with a self-addressed, postage-prepaid envelope to accommodate a compact disc (“CD”). In the alternative, he could pick up the CD in person.

The Custodian certified that after receiving the Complainant’s May 8, 2015 response objecting to the price of the CD, the purchase order for various office supplies was reviewed. He averred that a spindle of 50 CD-Rs cost \$19.65, making the cost per CD-R \$0.39, and cases in packages of 50 cost \$14.25, making the cost per case \$0.29. The Custodian’s Counsel certified that the City thereafter informed the Complainant by e-mail on May 12, 2015, that the cost for a CD and protective case was \$0.68.

The Complainant replied on May 20, 2015, alleging that the City could not require him to supply a self-addressed postage prepaid envelope, objecting to the cost of the CD and protective case, and formally requesting a copy of the applicable purchase order. The Custodian’s Counsel certified that the purchase order demonstrating that the cost of an individual CD and protective case would cost \$0.68, was provided via e-mail on May 20, 2015.<sup>6</sup>

The Custodian’s Counsel argued that the Complainant’s reliance on Livecchia was mistaken, as the Custodian in that instance “provided the requestor with a demand for a fee based on the estimated cost to send the materials through the US Postal Service.” The Custodian’s Counsel argued that the City in the instant matter “did not charge the requestor any fee for postage, nor did the City demand that postage be used.” The Custodian’s Counsel added that “the City could not charge the requestor the actual postage cost or an estimated postage cost due to the fact that the requestor failed to provide the City with a mailing address.” The Custodian’s Counsel reiterated that the City informed the requestor that he could either acquire the CD in person or supply the City with a self-addressed postage prepaid envelope to accommodate a CD that weighed approximately one-eighth of an ounce. The Custodian’s Counsel argued that “this allowed for the requestor to determine how much he would pay for postage, not the City, based on his choices at whatever postal service is local to him.”

Counsel argued that the Complainant “particularly due to not providing a mailing address” is in fact “the best party to determine the actual cost for mailing the CD in the circumstances.” The Custodian’s Counsel contended that, unlike in Livecchia, the City “neither provided the requestor with an actual cost or an estimated cost.” He maintained that the City “simply is not capable” of providing an estimated or actual cost of postage “to a requestor that chooses not to provide a mailing address.” The Custodian’s Counsel reiterated that the City, rather than charging an estimated postage fee, “instructed the requestor to pay for the actual postage on their [*sic*] own” by supplying a self-addressed postage prepaid envelope.

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<sup>6</sup> The Custodian noted that the initial May 20, 2015 e-mail, sent at 1:57 PM, advised the Complainant to remit a check or money order for \$1.68. The Custodian clarified that this was a typographical error, corrected in an e-mail sent 31 minutes later, at 2:28 PM.

## Analysis

### Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In the instant matter, neither the Custodian nor the Complainant dispute the existence of the record at issue, nor does either party dispute the Custodian’s timely response and willingness to disclose the record. The dispute here is limited to the Custodian’s response, asking the Complainant to provide a self-addressed postage prepaid envelope in order for the City to mail a copy of the video on a CD to him, and the Complainant’s contention that the Custodian violated OPRA for failing to provide the record in the specific delivery method.

The GRC has previously adjudicated complaints in which a custodian did not address the preferred method of delivery. In O’Shea v. Twp. of Fredon (Sussex), GRC Complaint Number 2007-251 (February 2008), the Complainant contended that the custodian’s response to his OPRA request was insufficient because it did not address his preference for e-mailed records over paper copies via regular mail. The Council held that “[a]ccording to [the] language of N.J.S.A. 47:1A-5(g), the Custodian was given two ways to comply and should have, therefore, responded [by] acknowledging the Complainant’s preferences with a sufficient response for each.” The Council further held that “the Custodian’s response is insufficient because she failed to specifically address the Complainant’s preference for receipt of records.” See also Paff v. Borough of Sussex (Sussex), GRC Complaint Number 2008-38 (July 2008), holding that although the custodian timely responded by granting access to the requested record, the custodian’s response was insufficient because she failed to address the preferred method of delivery.

Here, in the Custodian’s May 8, 2015 response, he informed the Complainant that the requested video was 167 MB and exceeded the limitations of the City’s network for sending via e-mail. Therefore, the Custodian did not violate OPRA for failing to provide the record in e-mail because he certified that he was unable to do so and offered an alternative method for disclosure of the record (sending a CD via mail).

With respect to the postage cost, the Council held in Livecchia that it is reasonable for a custodian to charge a requestor the actual postage cost associated with delivering records by mail and that a custodian must charge *actual* postage cost, not anticipated costs, associated with delivery by mail of the requested records. See also Constantine v. Township of Bass River, 406 N.J.Super. 305, 313 (App. Div. 2009).

Here, the Custodian argues that because the Complainant did not provide a mailing address, the City was unable to calculate the actual cost of postage. The Custodian further argued that the request for a self-addressed, postage prepaid envelope was simply a way to allow

the Complainant “to determine how much he would pay for postage . . . based on his choices at whatever postal service is local to him.” Although the Custodian’s actions appear to have been a good faith effort to help the Complainant, by having him calculate the actual postage cost himself, the Council’s previous determinations are clear that is the Custodian’s role to calculate and charge the actual postage cost.

In the instant matter, the Complainant’s decision not to provide his mailing address prevented the Custodian from calculating the actual cost of postage to provide the requested record. Therefore, the GRC finds that no unlawful denial of access occurred, because the Custodian certified that he was unable to provide the responsive video because the Complainant chose not to provide a mailing address. The Complainant would have needed to submit a mailing address in order for the Custodian to calculate and charge the actual postage cost to provide the requested record to the Complainant. See Livecchia.

### **Knowing & Willful**

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian’s compliance with the Council’s Interim Order.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. In the Custodian’s May 8, 2015 response, he informed the Complainant that the requested video was 167 MB and exceeded the limitations of the City’s network for sending via e-mail. Therefore, the Custodian did not violate OPRA for failing to provide the record in e-mail because he certified that he was unable to do so and offered an alternative method for disclosure of the record (sending a CD via mail).
2. In the instant matter, the Complainant’s decision not to provide his mailing address prevented the Custodian from calculating the actual cost of postage to provide the requested record. Therefore, the GRC finds that no unlawful denial of access occurred, because the Custodian certified that he was unable to provide the responsive video because the Complainant chose not to provide a mailing address. The Complainant would have needed to submit a mailing address in order for the Custodian to calculate and charge the actual postage cost to provide the requested record to the Complainant. See Livecchia v. Borough of Mount Arlington, GRC Complaint No. 2008-80 (April 2010).

Prepared By: Husna Kazmir  
Staff Attorney

April 19, 2016